



**Otieno v Nairobi Hospital; Kenya Hospital Association (Interested Party)
(Cause 419 of 2019) [2024] KEELRC 2802 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2802 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 419 OF 2019
L NDOLO, J
NOVEMBER 14, 2024**

BETWEEN

TIMOTHY ODHIAMBO OTIENO CLAIMANT

AND

THE NAIROBI HOSPITAL RESPONDENT

AND

KENYA HOSPITAL ASSOCIATION INTERESTED PARTY

RULING

1. This ruling flows from the Notice of Motion dated 29th July 2024, by which the Claimant seeks reinstatement of his claim which was dismissed on 9th April 2024, for non-attendance.
2. The Motion is supported by the Claimant’s own affidavit and is based on the following grounds:
 - a. That the matter was dismissed on 9th April 2024 for failure to attend court;
 - b. That previous Counsel for the Claimant was indisposed and unable to attend court when the matter came up for hearing;
 - c. That since 9th April 2024, the Claimant has moved the Court with haste and instructed new Counsel to take over the matter;
 - d. That unless the suit is reinstated, the Claimant’s Counsel will not be able to prosecute the matter and it will not have been determined on merit;
 - e. That the Claimant was summarily dismissed in a process that has undergone considerable overhaul since the promulgation of the Constitution of Kenya, 2010;



- f. That the Claimant's rights to fair labour practices under Article 41 of the Constitution was breached by his irregular dismissal;
 - g. That the Claimant was summarily dismissed on 9th May 2019, after a farce disciplinary hearing that did not abide with the conditions in Articles 47 and 48 of the Constitution and the Fair Administrative Action Act;
 - h. That the Claimant was not given an opportunity to be heard nor was he given copies of the evidence and materials relied upon by the Respondent to arrive at its decision, in breach of his rights under Articles 35, 47, 48 and 50 of the Constitution and Sections 3, 4 and 6 of the Fair Administrative Action Act;
 - i. That unless this matter is heard and determined on merit, the Claimant will suffer irreparable loss and injury;
 - j. That the orders sought will not prejudice either party.
3. The Respondent opposes the Motion by a replying affidavit sworn by its Company Secretary, Gilbert Nyamweya Omoke on 7th October 2024.
 4. Omoke depones that there is no merit in the Claimant's application. He points out that the Claimant had not taken any active steps to prosecute the suit since 2022. He states that the Claimant and his Advocate had failed to attend various pre-trial conferences before the Deputy; on 13th June 2022, 21st September 2022 and 7th November 2022
 5. Omoke further states that the Claimant and his Advocate failed to attend hearings fixed for 6th March 2023, 21st November 2023 and 9th April 2024.
 6. The Respondent maintains that it will be significantly prejudiced by the reinstatement of the suit as considerable time and expenses have been exhausted in the matter since its filing in 2019. Omoke depones that the Respondent has had to substitute witnesses and is likely to face similar challenges due to passage of time.
 7. In his plea before the Court for reinstatement of his claim, the Claimant simply states that his Advocate was indisposed when the matter came up for hearing on 9th April 2024. He does not however explain what action he himself took on that day; if indeed his Advocate was unwell, the least the Claimant would have done was to show up and explain his predicament to the Court.
 8. Further, the Claimant did not bother to give any explanation for failure to attend court on numerous previous occasions, both at the pre-trial and trial stages. The order sought by the Claimant is discretionary and the discretion of the Court is not candy to be dished out at will. A party seeking discretion must lay before the Court the reason why they deserve the exercise of discretion in their favour.
 9. In the submissions filed on behalf of the Respondent, reference was made to the decision in Bilba Ngonyo Isaac v Kembu Farm Ltd & another [2018] KEHC 4729 (KLR) where it was held that the discretion of the Court must be exercised judiciously on the basis of facts and law.
 10. The Respondent further cited the Court of Appeal decision in Habo Agencies Limited v Wilfred Odhiambo Musingo [KECA] 477 (KLR) where it was held that it is not enough for a party to lay blame on their Advocate, without demonstrating what action they themselves have taken in their capacity as a litigant.



11. In making the order dismissing the claim for non-attendance, I took notice of the Claimant's failure to attend court not once but on several occasions. In the absence of any explanation on the established pattern of failure to attend court, I have no reason to set aside my orders.
12. The result is that the Claimant's application dated 29th July 2024 is disallowed and the claim stands dismissed.
13. Each party will bear their own costs.
14. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF NOVEMBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Mogaka for the Claimant

Ms. Onyango for the Respondent

